IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

STATE OF TENNESSEE,	)	**C.C.A. No. 02C01-9601-CR-00031**
	)	
Appellee,	)	**SHELBY COUNTY**
	)	**Hon. W. Fred Axley, Judge**
VS.	)	
	)	**(Rape of a Child)**
RONALD SHIPLEY,	)	
	)	
Appellant.	)	**No. 94-11547 BELOW**

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OPINION FILED:_____

AFFIRMED

CORNELIA A. CLARK, SPECIAL JUDGE

OPINION

The defendant appeals as of right from his jury conviction of one count of rape of a child, presenting five issues for review: (1) that the evidence was insufficient to support the jury's verdict of guilt; (2) that the court erred in refusing to allow defense cross-examination of the state's expert on the issue of false complaints of sexual assault; (3) that the trial court erred in failing to instruct the jury regarding emotional outbursts by the victim's family during the trial; (4) that the trial court erred in not allowing the defendant to examine the alleged victim's mother regarding her prior history of false complaints of sexual harassment; and (5) that the trial court erred in applying four enhancement factors in sentencing the defendant to a maximum sentence of twenty-five (25) years. We affirm the judgment of the trial court.

On October 20, 1994, defendant Ronald Wayne Shipley resided in Memphis with his wife and three daughters. He was employed by Leon Ross & Sons Trucking Company and was also a member of the Air Force National Guard. At about 9:00 p.m. on the prior evening he had reported to work and driven a truck to Nashville. He returned to Memphis at approximately 10:00 a.m. on October 20. He completed his necessary paper work and returned home at approximately 11:30 a.m.

At the time of his return the house was empty; defendant's wife had taken his youngest daughter and a niece shopping. Defendant turned on the television set, lay down on his couch, and went to sleep. He woke up once when his wife and the two children arrived home between 2:15 and 2:30 p.m. and his daughter began to jump on him. He then went back to sleep and his wife put the girls down for a nap. Shortly after 3:00 p.m. defendant's wife woke him again to inquire if he would pick up their older daughters from school. Since he was tired and was expecting a call from his employer, he asked his wife to make the trip instead.

Defendant's wife left at approximately 3:05 p.m. to pick up the older children. What transpired during the wife's absence was significantly in dispute at trial.

The three-year-old victim, who was defendant's niece, testified that defendant did something "bad" to her. Using anatomically correct dolls, the victim communicated that the defendant had inserted his penis into her anus. Officer Delois Hamilton testified that during her initial interview with the victim, she stated that defendant came into the room where she was sleeping, undressed her, and then committed the rape.

Defendant testified that he never got off the couch while his wife was gone. Shortly after she left, the two younger children woke up and asked defendant if they could go outside and play. He agreed, instructing them to leave the sliding glass door open so that he could hear them. When defendant's wife returned to the house, both girls were in the yard playing. She testified that her niece gave her a hug and kiss and went back to playing. She stated there was no indication that the child had been injured in any way. She went inside the house, where her husband was still on the couch. The victim continued to play with her cousins for some time.

The victim's mother arrived to pick up her daughter at approximately 6:00 p.m. She testified that the victim came straight out of the back yard, jumped in her arms, and jumped in the car. She further testified that her daughter usually did not come willingly and that she normally preferred to stay and play with her cousins.

The victim's mother testified that after she arrived home and began cooking dinner, the victim suddenly yelled from the bathroom. Her mother went to the bathroom, found her daughter sitting on the commode attempting to defecate, and told her not to push so hard. As her mother attempted to clean up the victim, she discovered blood dripping from the victim's rectum. At that time her daughter said, "Uncle Ronald put his private part in mine." The victim's mother testified that her daughter's rectum was bruised, and there was a cut above the rectum causing the bleeding. She immediately took her daughter to her own doctor but was referred

to LeBonheur Children's Medical Center.

At LeBonheur the victim was examined by nurse Elizabeth Thomas. Thomas testified that the victim was "very tearful, was clinging to her mother, was crying". Her examination revealed that the victim had a 2-mm. tear in the perirectal area and there was rectal bruising surrounding the anal entry, approximately 5-mm. in size. The pattern was circular. Although the victim had been treated on two previous occasions for constipation problems, the victim's mother did not advise nurse Thomas about this problem. However, Thomas stated that the injuries she observed were not the result of constipation problems but were more consistent with some sort of blunt penetrating injury, something that would actually be going into the anus rather than coming out of the anus.

Sergeant Delois Hamilton of the Memphis Police Department Juvenile Abuse Squad was called by the defense. She testified that she took a statement from the victim on October 22, 1994. When she asked the child the name of the person who hurt her, the minor child initially answered "Mr. Tommie". Sergeant Hamilton testified that the minor child's mother then began to interfere in the questioning, and she was asked to leave the room. Ultimately the victim named defendant as her attacker. Sgt. Hamilton further testified that during that interview there was no mention of anal penetration occurring between the child and the defendant. The victim did say the defendant touched her anus, and made her touch his penis.

I.

Defendant first contends that the evidence is insufficient to support the jury's verdict. When an accused challenges the sufficiency of the evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or reevaluate the evidence

and are required to afford the state the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this court. Id. at 835.

A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the state, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Because a verdict of guilty removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a guilty verdict for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

In order to support a conviction for rape of a child, the state must prove that the defendant had unlawful sexual penetration of an individual under thirteen (13) years of age. Tenn. Code Ann. §39-13-522. There is no dispute in this case that the victim was three (3) years of age at the time of the rape. The victim testified that the defendant inserted his penis into her rectum. Although during her initial questioning by Officer Hamilton she mentioned someone named “Mr. Tommie”, she ultimately confirmed during her statement that the defendant was the perpetrator. The victim’s mother testified that on the day of the assault the victim went to the bathroom and yelled because of pain to her rectum caused by the injuries. The victim’s mother discovered that the rectum was bruised and bleeding from a cut in the rectal area. Nurse Elizabeth Thomas examined the victim later on the evening

of the assault and discovered a 2-mm. tear in the perirectal area and bruising surrounding the anal entry of approximately 5-mm. in size. Nurse Thomas opined that the injuries were more consistent with blunt penetration to the rectum rather than any result of constipation problems.

From a review of the record in this case, we can only conclude that the facts are sufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of unlawful penetration of an individual under thirteen (13) years of age. This issue is without merit.

II.

The defendant next argues that the trial court erred in refusing to allow defense counsel to cross examine nurse Elizabeth Thomas on the issue of false complaints of sexual assault. At trial, the state qualified Elizabeth Thomas as an expert witness. She had been a registered nurse for eighteen (18) years and was employed at the time of trial at the University of Memphis Loewenberg School of Nursing as an instructor. She also was an examiner for the Memphis Sexual Assault Resource Center. She held three certifications: one as a sexual assault nurse examiner, one as a crisis prevention and intervention instructor, and one national certification for psychiatric and mental health certification. She held an undergraduate degree in nursing from Union University and a master's degree from the University of Tennessee. Ms. Thomas examined the minor child on October 20, 1994, and testified for the state concerning her examination of the child and her opinion as to the potential cause of rectal bruising and a 2-mm. tear in the child's perirectal area.

During cross examination defense counsel asked Ms. Thomas in what percentage of cases one would expect to find false allegations of sexual abuse. The court sustained the state's objection to this question on the grounds that it fell outside the scope of her established expertise. The court's ruling was based at

least on part of Ms. Thomas' own statement that she was not qualified to testify about information related to false allegations of sexual assaults. She stated that she was not familiar with the percentages, nor was she familiar with new studies relating to false complaints. In response to a specific question about her knowledge of the percentage of false complaints that are made, she answered "I have no idea".

A trial judge has broad discretion in determining the admissibility and scope of expert testimony. Baggett v. State, 220 Tenn. 592, 421 S.W.2d 629, 632 (1967). See also State v. Oody, 823 S.W.2d 554, 565 (Tenn. Crim. App. 1991). The trial court's decision on the admissibility or exclusion of expert testimony will not be reversed on appeal absent a clear showing of abuse of discretion. State v. Rhoden, 739 S.W.2d 6, 13 (Tenn. Crim. App. 1987).

No such abuse of discretion is found in this record. The witness herself stated that she did not have the requisite knowledge to answer the questions being asked. Moreover, she specifically testified in front of the jury that she did not know the answer to the primary question about the percentage of false complaints made. This issue is without merit.

III.

Defendant next contends the trial court erred in failing to control emotional outbursts by the victim's family during the course of the trial. The outbursts themselves were not captured on the record. However, on several occasions defense counsel brought to the court's attention his concern about displays of crying or noisily leaving the courtroom during the course of the trial. At one point counsel also advised the court that two jurors were standing in a hallway near the victim and the victim's family when the victim hugged a police officer. At another point counsel advised the court that the victim's mother yelled down the hallway to the defendant's wife that it was "pretty bad for her to bring her daughter in to lie under oath on the

stand". On each of the occasions in question the court admonished the individuals involved in the outbursts. At defendant's request the judge did on one occasion voir dire the jury about one of the hallway incidents. No juror indicated that he or she had seen anything.

It is clear that the best course of action in a situation where jurors have observed such outbursts is to have the judge carefully, clearly and strongly instruct the jury about their duty to disregard any such outbursts or statements. See Franks v. State, 541 S.W.2d 955 (Tenn. Crim. App. 1976); McGee v. State, 451 S.W.2d 709 (Tenn. Crim. App. 1969). That did not happen in this case. However, defense counsel did not request any immediate instruction, nor did he move for a mistrial. He asked only that the jury be questioned and that the spectators be admonished. The trial judge complied with those requests. There is no proof any juror was exposed to anything inappropriate. Any relief to which appellant was entitled as a result of this incident has been waived. State v. Grooms, 653 S.W.2d 271 (Tenn. Crim. App. 1983); State v. Barton, 626 S.W.2d 296 (Tenn. Crim. App. 1981).

All cases of this kind are quite emotional. The record shows that this case was conducted with as much sensitivity as is consistent with the adversary process. Several of the incidents complained of took place outside of the courtroom and without clear proof that any juror observed them. Considering the whole record, we cannot say that the spectators' acts, more probably than not, affected the verdict of the jury. Rule 36(b), T.R.A.P. This issue is without merit.

IV.

Defendant next contends that the trial court erred in not allowing examination

of the victim's mother regarding her prior history of false complaints of sexual harassment. This issue was determined by motion in limine prior to trial. The court barred the use of such information on grounds of lack of relevance.

The determination of the relevance or probative value of evidence is within the trial court's discretion. State v. Leath, 744 S.W.2d 591, 593 (Tenn. Crim. App. 1987). The decision of the trial court will not be overturned absent a clear showing of an abuse of that discretion. State v. Williamson, 919 S.W.2d 69 (Tenn. Crim. App. 1995); State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App. 1995). There is no showing of abuse in this case.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. While the Advisory Commission Comments provide that the "test for admissibility is a lenient one," we do not believe the excluded evidence would have changed the results of the trial. Any error in excluding this evidence was clearly harmless.

V.

Defendant finally contends that the trial court improperly sentenced him. The sentence range for a Class A felony is fifteen (15) to twenty-five (25) years. The trial court in this case sentenced the defendant to the maximum sentence of twenty-five (25) years. Defendant contends that the trial court made inadequate findings, that the findings were incorrect, and that the trial court could not consider enhancement factors not presented in writing by the State.

When an accused challenges the length, range, or manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code

Ann. §40-35-401(d). If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after giving due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered sentencing principles and all relevant facts and circumstances". State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. §§40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In conducting a de novo review of a sentence, this court must consider:

(a) the evidence, if any, received at the trial and sentencing hearing;

(b) the presentence report;

(c) the principles of sentencing and arguments as to sentencing alternatives;

(d) the nature and characteristics of the criminal conduct involved;

(e) any statutory mitigatory or enhancement factors;

(f) any statement that the defendant made known on his own behalf; and

(g) the potential or lack of potential for rehabilitation or treatment.

Tenn. Code Ann. §§40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The burden is on the defendant to show that the sentence was improper. Sentencing Commission Comments, Tenn. Code Ann.

§40-35-401(d).

Defendant first asserts that the trial court erred in imposing sentence because it is restricted by Tenn. Code Ann. §40-35-210 to considering only evidence or information offered by the parties on the enhancement factors. Defendant contends that the state offered no proof at the sentencing hearing pertaining to the enhancement factors used by the court. However, defendant misapprehends this section.

Under Tenn. Code Ann. §40-35-210 a court at sentencing is required to consider all the following: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments of sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors; and (f) any statement the defendant wishes to make in his own behalf about sentencing. The court can use evidence or information offered by either party at any phase of the proceeding in determining what enhancement and mitigating factors apply. The court can also receive information as to these factors from the presentence report, even though the information was not asserted by the parties. T.C.A. §40-35-207(a)(5). Neither party is even required to file a statement of proposed enhancement or mitigating factors unless required to do so by the court. Tenn. Code Ann. §40-35-202(b). However, a court is always required to consider the existence of these factors in making its sentencing determinations. Finally, in conducting our de novo review, this court is authorized to consider any enhancement or mitigating factors supported by the record, even if not relied upon by the trial court. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993).

Enhancement Factors

The trial court found the existence of four enhancement factors as set forth

at Tenn. Code. Ann. §40-35-114:

(6) The personal injuries inflicted upon . . . the victim [were] particularly great.

(7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement.

(12) . . . The defendant willfully inflicted bodily injury upon [the victim] . . .

(16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

Factors (6), (12), (16)

Defendant argues that the trial court improperly applied the bodily injury factor (12), the particularly great personal injuries factor (6), and the potential for bodily injury factor (16). While it is questionable that the same acts can support both potential for bodily injury and actual bodily injury, without question the victim has experienced bodily injury under enhancement factor (12) and psychological problems which alone qualify as particularly great personal injuries under enhancement factor (6). See State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994). "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement, physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. §39-11-106(a)(2). The victim had scarring around the rectum area, a 2-mm. tear, bruises, and an enlarged anus. The injury also caused a great deal of bleeding. The victim's mother testified that the victim has had to attend a special day-care for counseling, that she has nightmares, and that she still is fearful because her aunt and uncle allowed this assault to occur. "Personal injury" is a term broad enough to include not only physical harm but also severe emotional injuries and psychological scarring. State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994). Factors (6) and (12) are established by the evidence.

Factor (7)

In State v. Kissinger, 922 S.W.2d 482 (Tenn. 1996), the Supreme Court

recently analyzed the meaning of factor (7), commission to gratify a desire for pleasure or excitement, and the standard of proof necessary to support the application of this factor. Proving a defendant's motive for committing a crime will always be a difficult task. However the legislature, in its wisdom, has placed that obligation on the state when the state seeks an enhancement. Id. at 491. There is no evidence in this record to indicate defendant's motivation in this case. He has not admitted guilt in any way. We must therefore conclude that the application of this factor is not supported by evidence contained in the record.

Factor (1)

The State argued at sentencing that the trial court should apply factor (1), a previous history of criminal convictions or criminal behavior. The trial judge did not specifically adopt this factor. However, we find that it does apply here. The defendant had a prior juvenile adjudication of delinquency based on the commission of aggravated sexual battery against an eleven-year-old girl.[1] Another of defendant's relatives testified at the sentencing hearing that he had fondled her on many occasions from the time she was eight years old until the time she was thirteen years old. She also testified that he forcibly raped her when she was thirteen. Proof of prior criminal behavior has been established and this factor is supported by the record.

Factor (15)

The trial judge also made no specific finding about defendant's abuse of a

[1]A recent amendment to Tenn. Code Ann. §40-35-114 requires that only those delinquent acts by a juvenile that would constitute a felony if committed by an adult be considered to enhance a sentence. That provision of the act took effect on July 1, 1995, and applies to sentencing of any defendant committing an offense on or after that date. In this case the offense was committed October 20, 1994. The defendant was sentenced June 27, 1995, before this provision took effect. In any event, the delinquent act considered by the judge would constitute a felony if committed by an adult.

position of private trust (15). We find this factor is supported by the record. The victim in this case was the three-year-old niece of defendant. She was regularly left in the care of defendant and his wife by his wife's sister while she worked. At the time this incident took place, defendant's wife had left him alone with this child and one of his own daughters. This factor is typically applied to the sentences of offenders who are the parents, relatives, or legal guardians of the child victims of sexual crimes. However, the Supreme Court has observed that the trial court should consider whether the offender formally or informally stood in any relationship to a victim that promoted confidence, liability, or faith. State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996). We believe that the nature of defendant's relationship with the victim did promote confidence and trust not only with respect to the victim but also her mother. Defendant took advantage of this trust by raping the victim while he was entrusted with her care. Thus, the application of this enhancement factor is supported by the evidence.

Mitigating Factors

Finally, the appellant argues that the testimony of several witnesses clearly supports the application of mitigating factors. We disagree. The mere fact that a large number of witnesses testified in the appellant's behalf did not require the trial judge to mitigate the sentence. The weight, if any, to be afforded to enhancement and mitigating factors is left to the trial judge's discretion. State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1993). Defendant cites no particular factors found in Tenn. Code Ann. §40-35-113. He states only that his wife testified that he was a good father and worked hard, and that this matter had an effect on their children. We find no abuse of discretion in failing to apply specific mitigating factors.

The sentencing range for the defendant for this Class A felony was from fifteen (15) to twenty-five (25) years. The presumptive sentence for the defendant

is the minimum sentence in the range before enhancement or mitigating factors are considered.[2] Having found the existence of four enhancement factors and no mitigating factors, we believe the sentence imposed of twenty-five (25) years is reasonable and appropriate.

The judgment of the trial court is affirmed in all respects.

_____
CORNELIA A. CLARK
SPECIAL JUDGE

CONCUR:

_____
JOHN H. PEAY
JUDGE

_____
DAVID H. WELLES
JUDGE

[2]Tenn. Code Ann. §40-35-210. The crime occurred October 20, 1994. The defendant was sentenced on June 27, 1995. Effective July 1, 1995, for crimes committed after that date, the presumptive sentence for a Class A felony is the mid-point of the range if there are no enhancement or mitigating factors.

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Appellee,	)	**SHELBY COUNTY**
	)	**Hon. W. Fred Axley, Judge**
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	)	**(Rape of a Child)**
RONALD SHIPLEY,	)	
	)	
Appellant.	)	**No. 94-11547 BELOW**

JUDGMENT

Came the appellant, Ronald Shipley, by counsel and also came the attorney general on behalf of the state, and this case was heard on the record on appeal from the Criminal Court of Shelby County; and upon consideration thereof, this court is of the opinion that there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Shelby County for execution of the judgment of that court and for collection of costs accrued below.

Costs of the appeal will be paid into this Court by the appellant, Ronald Shipley, for which let execution issue.

Per Curiam
Peay, Welles, Clark